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European charter on  
local and regional  
services of general interest



Conseil des Communes  
et Régions d'Europe  
Council of European  
Municipalities and Regions

March 2009

# Introduction

1. Europe's local and regional governments have always organised and provided essential services for their citizens and businesses. These can be delivered in many different ways – directly, through contracts with the private sector, or through different kinds of PPP, for example. There is no one “best way” to deliver public services - it depends on local democratic choice, and local circumstances.
2. In recent years, however, the provision of public services – described within the EU as Services of General Interest (SGIs) - has come under increasing scrutiny from the European Commission as it seeks to implement and expand the European internal market concept.
3. This has given rise to a growing tension between local and regional governments and the European Commission on how far the rules of the internal market do, or should, apply to local public services. The local government sector has felt that the Commission – whilst formally professing neutrality - has in fact been at times overly ‘market-focused’ without always really taking into account the specificities of local and regional authorities and their services.
4. The global financial and economic crisis, which has a major economic and social impact at local and regional level, demonstrates that market forces alone – important though the market is and will be – do not always deliver a successful and sustainable economy and society. What is needed is a better balance between the private and public actors. And here, local and regional governments have an essential role to play.
5. Local and regional governments perform three roles:
  - they promote a sustainable and successful development of their territory, in the interests of their citizens
  - they organise, commission, finance and deliver essential public services, both universal and targeted to those most in need
  - they act as the democratic voice and advocate for their communities.
6. To these ends, local and regional governments contribute at European level to meeting the objectives of the Lisbon Agenda through a stronger territorial cohesion, creating growth and jobs, a more competitive economy, a good standard of social and environmental protection, and providing good quality, affordable and accessible public services.
7. They are also committed to upholding the principle of local democracy and self-government, which means that locally elected authorities decide democratically on all local issues within their responsibility. This includes, in particular, the ability to decide freely on how their public services are to be tailored and delivered for their local people. They are the best placed to make these judgments, and to define and evaluate the standards of quality and responsiveness which the provider must adhere to.

8. But so far the principle of local and regional self-government has not been properly respected in the EU framework. The problem is not confined to the European Commission. In recent years, the European Court of Justice has reached a number of decisions which have been criticized by the representative associations of local and regional governments such as CEMR for undermining the right of local democratic choice. We are concerned that through these decisions, the Court has been actively creating new law, which has not been debated or enacted democratically with the involvement of all national and European-level stakeholders.
9. In response to these developments, there has for some time been a debate about whether there should be a new "horizontal" European law on public services. Local governments and their associations have not reached a consensus at European level on this.
10. However, some changes in the law are now urgently needed, in order to overcome the effects of decisions which have undermined the principle of local and regional self-government in relation to the organisation of public services. These changes could mainly be achieved by amendments to specific EU directives or regulations, in the absence of a broader European law on public services.
11. The purpose of this Charter of Local and Regional Services of General Interest is therefore to be an instrument to promote action and campaigning on the issues – an instrument which can help to ensure that the principles of local and regional self-government, subsidiarity and proportionality will in future be properly respected and upheld. A strong, successful Europe needs strong, democratic local and regional governments, free to make local decisions on their public services in the interests of their local citizens.

# **EUROPEAN CHARTER ON LOCAL AND REGIONAL SERVICES OF GENERAL INTEREST**

***The Council of European Municipalities and Regions, representing European local and regional governments, has agreed upon the following Charter as a basis for action to protect the principles of local self-government and subsidiarity in relation to the public services provided by or on behalf of local and regional governments:***

## **Article 1 - The principles of local and regional self-government in relation to Services of General Interest**

- (1) The principles of local and regional self-government, acknowledged by the European Union and the Council of Europe (including in particular the European Charter of Local Self-Government), are essential cornerstones of Europe's multi-level system of democracy and governance, complementing the principles of subsidiarity and proportionality.
- (2) It is the responsibility and the right of local and regional governments to decide, democratically and on their own initiative, on the best means of providing, commissioning and organising Services of General Interest, and Services of General Economic Interest, in the interests of local people and the users of those services.
- (3) In the exercise of this wide discretion, local and regional governments have the task of deciding whether services for which they are responsible should be delivered by the authority itself, by a legal entity which it owns or controls, through intercommunal service arrangements, by contract or concession with a private sector partner, by public private partnership, or other lawful means.

## **Article 2 – Definition of Services of General Interest by local and regional governments**

- (1) The relevant local or regional government may (within the framework of domestic law for local and regional public services) define which services, for which they are responsible and/or which they finance, are Services of General Interest, or which are Services of General Economic Interest.
- (2) The exercise of this discretion by local and regional governments in defining which services are Services of General Interest, and which are Services of General Economic Interest, should not be open to challenge in any legal proceedings except in case of manifest error. The burden of proof in such cases should fall on the European Commission or other complainant, not on the local or regional government concerned.

### **Article 3 – Application of internal market rules to local and regional Services of General Interest**

- (1) Local and regional public services of a non-commercial character, and having in particular a social (including health), educational, cultural or environmental purpose, should not be considered as Services of General Economic Interest, and such services should therefore not be subject to the European Union's internal market rules.
- (2) Services of General Economic Interest which are of a purely local or regional character, and whose provider does not compete elsewhere in relation to that type of service, should not be subject to the EU's internal market rules, unless (having regard to their scale) the exceptional situation referred to in (3) below applies.
- (3) The European Union should in any event only be able to limit the exercise of the discretion and rights set out in Article 1 by local and regional governments in exceptional cases involving Services of General Economic Interest of substantial scale, where:
  - the functioning of the internal market would be adversely affected to such significant extent as to be contrary to the interests of the European Union,
  - European legislation or the Treaty expressly so provide, and
  - The proposed action would fully comply with the principle of proportionality.

### **Article 4 – Direct and in-house provision of services**

- (1) A local or regional government may provide a service for which it is competent directly, or through a legal entity, which it owns or controls ("in-house").
- (2) Where a local or regional government assigns the delivery of such a service to a legal entity which it wholly owns, it should have the right to do so without a requirement to tender the service, provided that the legal entity does not also compete on external markets in relation to that type of service.
- (3) Where a local or regional government assigns the delivery of a service to a legal entity which it controls, it should have the right to do so on the same basis as set out in (2) above, provided also that any active private partner has been selected through a transparent process.
- (4) The fact that the local or regional government does not have 100% ownership of the legal entity should not, of itself, mean that it does not control it. The question of whether a legal entity is publicly controlled should be one of fact, depending on whether there is a dominant public influence and on whether the local or regional government can control the entity in relation to its strategic and major operational decisions.
- (5) In particular, the purely financial participation of a private or other partner in the legal entity, without involvement in its strategic and major operational decisions, should not of itself mean that the legal entity is not publicly controlled nor preclude the existence of an in-house relationship.

## **Article 5 – Intercommunal and other public-public arrangements for service delivery**

- (1) A local government should have the right to assign the delivery of a service for which it is competent to a legal entity set up by two or more local governments for the provision of cost-effective intercommunal services, without a requirement to tender the service, provided that
  - the relevant local governments between them own or control the intercommunal legal entity, and
  - the legal entity does not compete on external markets in relation to that type of service.
- (2) A local government should also have the right to assign the delivery of such a service, on the same conditions, to another local government, which provides such service for those two local governments, or for them and other local governments.
- (3) A local government should also have the right to assign the delivery of such a service, on the same conditions, to another public authority where this is permitted by domestic law, and where that public authority is not performing activities of a commercial character in relation to that service.
- (4) The types of arrangements established by local governments under this Article should in any event be seen as internal means by which they perform their public responsibilities, and thus outside the scope of the EU's internal market rules.
- (5) Subject to Article 3(3), the above provisions should apply likewise to such arrangements by and between regional governments.

## **Article 6 – Public service compensation and state aid**

- (1) Where a local or regional government provides compensation to an undertaking delivering a service of general economic interest, whether public or private, that compensation should not constitute state aid on condition that:
  - the basis or formula on which the compensation is calculated has been established on a transparent basis;
  - the compensation does not exceed what is necessary to cover the costs of the relevant public service obligations for which the compensation is intended, taking into account the relevant revenue and allowing for a reasonable profit.
- (2) The existing requirement (as defined by the European Court of Justice in the Altmark case) that the recipient of public service compensation must justify its costs by reference to those of a similar enterprise, should be repealed.
- (3) In the meantime and for the avoidance of doubt, the European Commission should provide state aid "block exemptions" for local and regional governments from the obligation to notify any cases of public service compensation where no aid is provided in addition to the public service compensation. Any general reporting requirements on governments at all levels in relation to this system of exemptions should be kept to a minimum.

### **Article 7 – Quality and performance management**

- (1) Local and regional governments are accountable to their citizens and electors for their performance in developing and delivering services; this implies a commitment to providing and improving cost-effective services of a high standard, taking account of the financial means available, and adapted to the needs of the users.
- (2) For these purposes, local and regional governments are committed to review and evaluate the quality and cost-effectiveness of the services for which they are responsible, including systems such as voluntary benchmarking.
- (3) Such benchmarking may involve comparators at local, regional, national or European level, but should not – in accordance with the principle of local self-government - involve mandatory European standards or evaluations.

### **Article 8 - Action in support**

All European local and regional governments and their associations, as well as the European Parliament, the Committee of the Regions, and all other partners, are invited to support this Charter and to promote the effective implementation of its principles and provisions.



## Explanatory Statement

1. The Charter of Local and Regional Services of General Interest, drawn up by the Council of European Municipalities and Regions, addresses a series of specific issues, and makes specific proposals for what European law should or should not regulate and permit in this field.
2. The Charter does not presume that one way of delivering public services is better than another. Many local authorities tender out a large proportion of their services. Others prefer to keep many services managed “in-house”. That is what local and regional democracy are there to decide, and maintaining this freedom to decide without unjustified restrictions at European level is the very purpose of the Charter.
3. **Article 1** sets out this point, asserting that the principles of local and regional self-government are essential cornerstones of Europe’s multi-level system of democracy and governance. We may note that the Treaty of Lisbon makes explicit reference to local and regional self-government, as part of the national identities of the Member States, which the Union is committed to respect.
4. The reference in Article 1(3) to the “wide discretion” of local and regional authorities in the area of public services is also a cross-reference to the Protocol to the Treaty of Lisbon on Services of General Interest, whose first Article asserts that the “shared values of the Union in respect of services of general interest include in particular... the essential role and the wide discretion of national, regional and local authorities in providing, commissioning and organizing” such services “as closely as possible to the needs of the users”.
5. The Treaty of Lisbon, at the time of drafting this explanatory document, had not come into effect, but since the provisions of the Protocol are said to be “interpretative”, we may take it as a correct expression of how the current legal position should be seen.
6. **Article 2** affirms that each local and regional government should be able to define which public services for which they are responsible under domestic law are Services of General Interest (SGIs), and which are Services of General Economic Interest (SGEIs). This distinction between “economic” and “non-economic” services is of real importance, since the European Treaties – in particular the internal market rules – only apply to SGEIs. (On this point, see also paragraph 28 below).
7. In recent years, there has been a trend by the European Commission and the European Court of Justice (ECJ) to define more and more services as “economic” and thus within the relevant Treaty rules. We fear that if this (in many cases unjustified) trend continues, many local non-profit social services, for example, could be deemed to be “economic” and thus “market” operators. Therefore, Article 2 emphasizes that it is for the local or regional authority itself to define what it considers to be an “economic” service, and thereby to protect non-commercial public (and publicly-financed) services from being subject to EU internal market rules.

8. Article 2(2) then underlines that this power of decision by local and regional authorities as to which of their services are SGIs and which SGEIs, should not be capable of legal challenge except in case of "manifest error", with the burden of proof on the party alleging the error.
9. **Article 3** then deals with this key issue of which public services the EU's internal market rules should apply to. It proposes three key points, which in effect would put some limits on the applicability of those rules. The aim of all three is to keep the EU's rules to cases which have a real effect on the good functioning of the internal market, and to stop them from interfering with smaller-scale, purely local or regional services.
10. In Article 3(1), it affirms the general principle that local and regional public services of a non-commercial character, and having in particular a social (including health), cultural, educational or environmental purpose, should not be considered as SGEIs. This aims to stop the slow "creep" of ECJ decisions towards defining all local public services as "economic" and whose providers are therefore considered as "market" operators. Some of CEMR's members, as well as many others, would prefer to have a tighter definition than that proposed in this paragraph to counter this judicial tendency; however, no agreed definition has yet been reached which has achieved wide support, so the terms of Article 3(1) are proposed in the absence of such tighter definition. It is to be noted that the definition of the term "services" in the existing European Community Treaty (Article 50) refers explicitly to "activities of a commercial character". In general terms, most non-profit providers of public services would be considered to be non-commercial in character.
11. Article 3(2) goes a step further, and offers a slightly different approach, stating that SGEIs of a purely local or regional character should also be excluded from application of the internal market rules, on the vital condition that the provider of the service does not compete elsewhere in relation to that kind of service.
12. Article 3(3) proposes a general limitation on the scope of the EU's rules in relation to the exercise by local and regional authorities of their wide discretion in respect of public services. The EU should only be able to intervene in cases of local and regional SGEIs of substantial scale, where the functioning of the internal market would be adversely affected to such a significant extent as to be contrary to the interests of the EU. In addition, the action taken must be authorized by an express provision of European legislation or Treaty, and must be proportionate.
13. **Article 4** deals with the "in-house" situation, i.e. where services are provided by a company which is set up and owned by the local or regional authority. In several European countries, this is a regular method of organising and delivering services; in other cases, such companies may be used for more limited purposes. The main question here is whether the local or regional authority must invite tenders for the service under the EU public procurement legislation, or whether it can assign it directly to its company.

14. The ECJ clarified (in the Teckal case) that the EU legislation does not apply to a pure in-house situation, where the local authority exercises a control over the company similar to that which it exercises over its own departments, and the company carries out the essential part of its activities with the controlling local authority or authorities. However, later cases have tended to restrict this interpretation to a very limited scope. Moreover, the ECJ has also claimed that there can be no in-house situation (therefore there must be compulsory tendering) if even 1% of the share capital of the company is owned by a private sector partner.
15. Against this, there has been recent EU legislation in the field of public passenger transport (Regulation (EC) 1370/2007) which offers a different and wider "in-house" test. This Regulation expressly states that 100% ownership by the public authority is "not a mandatory requirement for establishing control... provided there is a dominant public influence and that control can be established on the basis of other criteria", such as effective influence and control over strategic and other management decisions.
16. Therefore, in Article 4 the Charter proposes to use this same approach for all services and companies owned and controlled by local and regional authorities – see Article 4(4). In addition, this Article provides two specific conditions – first, that the company should not compete on external markets in relation to that type of service. Second, that any private partner should have been selected through a transparent process. Finally, it proposes in any event that a purely financial participation by a partner in the company should not preclude the existence of an in-house relationship.
17. **Article 5** deals with inter-communal and other public-public arrangements for service delivery, where the position under EU law remains complex and even uncertain. The European Commission has in general terms argued that if one local authority seeks to assign a service task to an inter-communal company, it can only do so if that company wins in an open tendering exercise. This approach, if correct, would put many such companies at risk, because the loss of such assignments from one or more of the participating local authorities could undermine the company's viability for all those authorities involved.
18. Local authorities have always argued that the use of inter-communal companies and similar arrangements are lawful internal ways of organising and delivering services in an economic way by acting jointly with other – usually neighbouring – authorities. This approach received general support from the European Parliament in its 2006 resolutions on Public Private Partnerships (see paragraphs 42 – 48), and on the Commission's White Paper on SGIs (see paragraph 25). Moreover, the ECJ has in 2008 upheld the existence of an in-house situation in one case involving Belgian local authorities (the Coditel case), where it felt the Teckal case criteria (see paragraph 13 above) were fully met.
19. Article 5(1) of the Charter seeks to clarify the lawfulness of inter-communal arrangements of these kinds, where the grouping of authorities together own or control the company, and the company does not compete on external markets for that kind of service.

20. In addition to inter-communal companies, there are many cases where, for mutual efficiency, two or more local authorities agree together that one should provide a service for another. This can relate to "back office" services like ICT, as well as front line services to citizens. Article 5(2) and (3) propose that this power to assign services directly to another local authority or indeed another public authority should be permitted, provided that the other public authority is not performing activities of a commercial character.
21. Article 5(5) applies the same approach to arrangements by and between regions. Regions, of course vary greatly both within and between countries. To take account therefore of the fact that in some countries, regions are very large in terms of geography, economy and population, this power for regions to make joint arrangements would be subject to possible restriction under the provisions of Article 3(3) – that is, if the arrangements involved SGEIs of substantial scale, and if the functioning of the internal market would be adversely affected to such significant extent as to be contrary to the interests of the EU etc. On the other hand, even regions large in dimension may have a sparse population, for which joint arrangements are necessary or desirable, without impact on the European internal market.
22. **Article 6** relates to state aids and public service compensation. For years, there had been a debate – and disagreement in the ECJ – as to whether the provision of pure compensation (for carrying out public service obligations) by a public authority to a provider of a SGEI, was a state aid. In the Altmark case (involving German bus transport companies) the ECJ finally decided that the provision of public service compensation was not to be seen as state aid provided that certain criteria were met. The most contentious and difficult one is that (in the case of a service that has not been tendered) the level of compensation must be determined on the basis of an analysis of the costs of a well-run typical undertaking (taking into account receipts and a reasonable profit).
23. This last condition left many local and regional services in a state of uncertainty, and the European Commission intervened with a formal decision not to require notification of a potential state aid in cases of public compensation below certain financial thresholds. This has certainly helped to reduce the difficulties in the short term, but the last Altmark criterion is wrong in principle, since the issue should be – is the payment a compensation, or is it an aid? If it is compensation, the fact that the undertaking's costs are a bit above a "well-run" comparator's should be a matter for local democratic choice, not a matter for European state aid laws.
24. Therefore, Article 6(1) and (2) propose to ensure that public service compensation is separated from state aid, provided that the basis or formula for the aid has been established on a transparent basis, and does not exceed the costs of carrying out the public service obligations; the last Altmark criterion should be excluded. Pending this change in the law, Article 6(3) proposes to keep the "block exemption" from the obligation to notify the Commission from cases of pure public service compensation.
25. **Article 7** affirms that local and regional governments are accountable to their citizens for their performance in delivering services, and they should be committed to review and evaluate the quality and cost-effectiveness of those services, including means such as voluntary benchmarking.

26. Whilst such benchmarking may involve comparators at local, regional, national or European level, Article 7(3) makes clear that there should be no mandatory European standards or evaluations of local and regional services.
- 27. Article 8** invites local and regional governments, their associations, and other partners to support the Charter and promote its implementation.
28. Finally, it should be noted that the term "Services of General Interest" (SGIs) has more than one meaning; when contrasted with Services of General Economic Interest (SGEIs), it means Services which are not – or should not be – within the internal market rules, and in current jurisprudence are considered not to be "economic" in character. At other times – as in the title to this Charter, it is used as a generic term to include both categories. The Protocol to the Treaty of Lisbon on Services of General Interest uses the term in the wider sense, to cover all types, but also refers in its Article 2 to "non-economic" SGIs. We have not used the latter term because it would continue the present confused and unjustified definitions of services as "economic" or "non-economic", a test which the Treaty nowhere provides for but which has been invented by the European Commission and the European Court of Justice.

The **Council of European Municipalities and Regions (CEMR)** is the broadest association of local and regional authorities in Europe.

Its members are national associations of local and regional governments from over thirty European countries.

The main aim of CEMR is to promote a strong, united Europe based on local and regional self-government and democracy; a Europe in which decisions are taken as closely as possible to its citizens, in line with the principle of subsidiarity.

CEMR's work covers a wide range of themes, including public services, transport, regional policy, the environment, equal opportunities...

CEMR is also active on the international stage. It is the European section of the world organisation of cities and municipalities, United Cities and Local Governments (UCLG).





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